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THE JURISDICTIONAL QUESTION: LOCAL VS. FEDERAL AUTHORITY

PRESENTED BY

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Outline and Overview of Presentation:

I. Introductory Remarks

II. The Telecommunications Act of 1996, Section 253: Sweeping changes are enacted against the backdrop of traditional municipal authority to manage the rights of way

A. Overview of Section 253 (text of statute appended)
The statute reflects a carefully crafted balance between deregulation of the telecommunications market at the federal level, and preserving state and local authority to regulate in certain prescribed areas.

B. Section 253
(1) The text of the provision: a prohibition on certain regulations in (a) coupled with a "safe harbor" to preserve local regulations under (c)
(2) The legislative history of Section 253
(3) The FCC's early and consistent interpretation of the provision
(4) Federal Courts begin to develop clear themes in the analysis

C. The import of Section 601(c)(1)

D. The scope of the FCC's jurisdiction:
a. The FCC's own view as expressed to the 2nd Circuit Court of Appeals
b. The decision of the 2nd Circuit

III. There is no compelling reason to change course now.

A. The FCC's LSGAC is working with national organizations, including industry

B. This forum is exactly the kind of dialogue that is needed – and later sessions describe the work being done at the policymaking level

C. Right of way regulation is not in fact a barrier to effective competition

IV. Conclusion

The complexity of the legislation, and the significant interests at stake on all sides dictate caution in attempting a "federal" solution

Appendices:

- Text. Section 253 of the Telecommunications Act of 1996
- Legislative history of Sections 253 and 601(c)
- Briefs of the Federal Communications Commission before the Second Circuit Court of Appeals in TCG New York v. City of White Plains
- Letter from FCC General Counsel Mago to Kenneth Fellman dated October 18,2001
- NARUC Resolution developed in June, 2002
- Right of Way video produced by the League of Oregon Cities

I. Introductory remarks:

I would like to thank the Chairman, FCC Commissioners and staff for this opportunity to present local government views on this vitally important topic. I especially want to thank Jane Mago for her clear and consistent vision and careful legal work in this area. According to this panel's description, it is our responsibility to provide insights into just what authority the FCC has to regulate the areas of state and local government right-of-way management practices and compensation that should be paid for access to, and remaining in, a community's rights-of-way. In many ways our panel has the easiest job of the day, because Congress made the answer to these questions quite clear.

I will present an overview of Sections 253 and 601 of the Telecommunications Act, describe their legislative history, and briefly cover the precedent established by the FCC and Court decisions as to how these provisions should be interpreted, and what entity has jurisdiction to interpret and enforce them.

The theme of my remarks is this: The FCC and the Courts are operating effectively based on a well-reasoned view of the sphere of authority occupied by each of them. Given the vast changes engendered by the TCA, it is hardly surprising that it might have taken some time for this clear pattern to emerge. But it is emerging. It may not be fully to the liking of all interests, but a prudent course has been set.

II. THE TCA OF 1996: SECTION 253 AND 601(c)

A. OVERVIEW

In the words of one Court that recently considered these provisions, the preemptive language of Section 253 and the administrative remedies provided in the statute reflect "a carefully crafted balance between deregulating the telecommunications market at the federal level and preserving state and local authority to regulate in certain prescribed areas."[1]

S. SECTION 253

1. Text – attached

In summary, Section 253(a) of the TCA prohibits State and local governments from adopting and enforcing laws that prohibit or have the effect of prohibiting the provision of telecommunications services. 47 U.S.C. § 253(a). Section 253(b) preserves the ability of states to regulate telecommunications on the basis of the "public good." 47 U.S.C. § 253(b). Section 253(c) preserves the authority of State and local governments to manage public rights of way, as well as charge

[1] *Qwest Corporation v. City of Santa Fe, 2002* WL *31* 163012, at 9 (D NM 8/29/02).

"fair and reasonable compensation," on a "competitively neutral and nondiscriminatory" basis. 47 U.S.C. § 253(c).

2. LEGISLATIVE HISTORY

I have appended to my testimony an exhaustive description of the events leading up to the adoption of Section 253 and details of how both chambers of the Congress specifically rejected the notion that the FCC should oversee local right-of-way management and compensation. The legislative history reflects a concern for the costs that would be imposed on local governments if they were required to travel frequently to Washington, DC to defend their regulations before the FCC.[2] The report of the House of Representatives makes it patently clear that the intent of Congress was to leave undisturbed the traditional local authority to manage public rights of way.[3] Congress "did not want and had no idea of taking away that basic responsibility for protecting the public safety and welfare, noting that [Subsection (c)] was added in response to the request of the mayors."

3. FCC GUIDELINES AND DECISIONS

The FCC issued a Guideline in 1998, Entitled "Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act".[4] the FCC has also had occasion to consider the implications of Section 253 on several occasions – all of them are cited to the 2nd Circuit Court of Appeals in the FCC's amicus brief before that Court in the White Plains case.

4. COURT DECISIONS

The FCC's approach is consistent with the themes developing as courts around the Country consider the provision. In the areas of jurisdiction over these disputes, the nature of claims that may be brought and the relief that can be had, as well as the substantive mechanism for analysis. It is clear that this analysis is conducted as follows:

a. The first step in the analysis is a showing that in fact the local government regulation has created a barrier to entry by prohibiting or having the effect of prohibiting the provision of a telecommunications service.

b. If that showing is not made, the inquiry ends.

c. If the showing required under Section 253(a) is made, the inquiry turns to the question of whether the offending regulation can be saved by the safe harbor of Section 253(c).

d. If the regulation is not saved, it is deemed preempted.

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[2] 141 **Cong. Rec.** S8170 **(daily ed. June** 12, 1995, **June** 14, 1995, **remarks** of **Sens. Feinstein and Gorton, respectively).**

[3] **See House Report** 104-204, **reprinted in** US **Cong. & Ad. News, March** 1996, **Volume 1, Legislative History section at** 41; **see *also*** 141 **Cong. Rec.** S8174 **(Senator Hollings, June** 12, 1995)

[4] 13 **FCC Rcd.** 22970 (1998).

e. The analysis needs to proceed in the context of congress' clear intent: no preemption is to be implied.

Examples of Court decisions: 2nd Circuit in White Plains, Sixth Circuit in *Dearborn*, 9th Circuit in Auburn, two recent federal district court opinions: Qwest *v. Portland*, and *Qwest v.* Sanfa Fe. The same analysis of Section 253 was also applied by District Court of N. Cal in Berkeley, a case still underway following preliminary rulings.

C. **SECTION 601(C) WAS ENACTED AT THE SAME TIME AS SECTION 253.**

Section 253 must be read together with Section 601(c)(1), which provides: "This act and amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly **so** provided in such Act or amendments." Pub. **L. No.** 104-104, Title **VI,** Sec. 601(c)(1).

D. THE **SCOPE OF** FCC **JURISDICTION**

1. White Plains. The recent 2nd Circuit decision in the White Plains case represents the clearest and most thoughtful discussion of the scope of FCC jurisdiction in 253 matters. The Court's opinion was informed by a Supplemental Brief filed by the FCC in response to questions from the Court. The FCC noted that some district courts had held that the FCC has concurrent jurisdiction with the Courts to consider regulations under Section 253, and noted that the FCC has no independent enforcement authority (as distinguished from its authority to make declaratory rulings in response to a petition).[5]

The Court drew the competing interests together by determining that the FCC should be granted deference in its interpretations concerning the scope **of** Section 253(c), but that its decisions are not controlling.[6] This is consistent with the 11th Circuit's approach in *BellSouth v.* Palm Beach, 252 F3d at 1190-91 (cited in FCC's supplemental brief at page 5)

Importantly, the FCC declined to provide an opinion on the Compensation question pending before the Court.[7] And, the Court did not decide it.

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[5] **FCC Brief, at 3-4.**

[6] **White Plains, supra, at 14-16 (slip opinion 9/12/02).**

[7] **FCC Counsel Jane Mago clarified in a letter to Kenneth Fellman that in fact a footnote in the amicus brief, argued by some to have stated an opinion adverse to White Plains, had been "misunderstood" and "misused. The supplemental brief also clarified this point for the Court See, FCC Supplemental brief at 9-10.**

2. FCC Regulatory History.

Commencing with the Troy decision in the year following passage of Section 253, the FCC has been careful to avoid the question of its jurisdictional limitations under Section 253(c) of the Act.

a. In ***Troy,*** 12 FCC Rcd 21396 (1997), the FCC sidestepped the question for the first of what have been numerous occasions:

'We are cognizant of the arguments of the City and the other municipal commenters that the Commission lacks jurisdiction under section 253(d) to preempt actions taken by the City pursuant to section 253(c) . . . Our observations here do not address the merits of that iurisdictional aruument; rather they are confined to our view of the message Congress intended to send through the express terms of Section 253(c). No one disputes the possibility that a municipal ordinance would be subject to preemption if it were found to violate the proscription contained in Section 253(a), and not fall within the express terms of the reservation of authority in Section 253(c). The dispute disclosed in this record is over the question of who is authorized to make this determination -- this Commission or the local federal district courts. . . Bv our decision here, we leave that important issue for another day. "

Id. at fn. 268 (Emphasis added)

b. In ***Petition of*** the State ***of Minnesota,*** 14 FCC Rcd 21697 (1999), the Commission again avoided taking a position on its jurisdiction under 253 (c). The Commission stated in reviewing a compensation argument that it "must consider whether the agreement is protected from preemption by 253(c) in order to fully respond to Minnesota's position." The FCC also mentioned that "our discussion **of** these issues should not be interpreted as addressing potential issues involving the Commission's jurisdiction under 253(c)." Id. at ¶ 63.

c. Section 253(d). There is no history, either legislative or in any regulatory proceedings, which addresses the Commission's jurisdiction, if any, granted by Section 253(d).

(1). There are numerous cases where the FCC states that it must preempt enforcement of a state law if the law violates Section 253 (a). See, e.g., ***Western Wireless Petition for Preemption,*** 15 FCC Rcd 16227, 16232 (2000)("If a requirement violates section 253(a) and does not fall within the safe harbor of section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d)."); AVR, LP D/B/A Hyperion of Tennessee, Petition for Preemption, 14 FCC Rcd 11064, 11068 (1999)("If [the statutes] are proscribed by section 253(a), and do not fall within the scope of 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d)").

(2). The cases discussing local government ordinances, i.e., Classic Telephone, Troy, and Huntington Park, however, have not addressed how (c) relates to (d) and (a). **See,** e.g., *California Payphone* ***Assoc.*** *Petition for Preemption of City of Huntington Park,* 12 FCC Rcd 14191 (1997) ("Because the record does not support a finding that the Ordinance falls within the proscription of section 253(a), we do not reach the question whether section 253(b) applies in these circumstances").

3. Refusal to limit fair and reasonable compensation to cost reimbursement.

The Commission has avoided, despite being petitioned or encouraged by numerous commenters, opining as to what constitutes "fair and reasonable compensation."

A review the FCC's decisions regarding Section 253 reveals that the Commission too has always understood that it has certain jurisdictional limitations. The FCC has never:

- Asserted that it has jurisdiction to address compensation issues pursuant to Section 253(c); nor
- Proposed a standard as to just what "just and reasonable compensation: means, let alone limit that amount to the recovery of costs.

In *Troy,* despite the arguments by a number of commenters that percentage-based fees did not constitute "fair and reasonable compensation," the FCC never addressed the issue.[8] The Commission did state that "[o]ne clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do **so** on a competitively neutral and nondiscriminatory basis." *Troy* at ¶ 108. This is the extent of the Commission's analysis of "fair and reasonable compensation."

In *Petition* ***of*** *the State of Minnesota,* 14 FCC Rcd 21697 (1999), the Commission again relied on the determination that Section 253 required competitively neutral and nondiscriminatory access rather than address whether or not just compensation was required. The Commission denied Minnesota's request for a Declaratory Ruling, not because the pricing contained in the franchise failed to meet the "fair and reasonable compensation," standard laid out in 253(c) but because an exclusive contract was in violation of 253(a) of the Act. *id.* at ¶ 36.

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[8] **See,** *e.g., Troy,* **12 FCC Rcd 21396, 21433, at ¶ 87 (1997)** ("**TCI contends that the franchise fee based upon a percentage of the operator's gross revenues exceeds the 'fair and reasonable compensation' to which the City is entitled under 253(c). TCI argues that both federal and state law require cost-based fees for use of the public rights-of-way**")

III. RECOMMENDED APPROACH: JURISDICTION

The best approach is in my view to stay the course and not add yet another layer of regulation and uncertainty to an already complex field. There are other efforts underway to sort out controversies over right of way regulations.

A. The LSGAC, under the leadership of Ken Fellman (who will be speaking later today), is actively pursuing the issue and has met with the Industry's right of way working group. Ken will talk more about this.
B. This forum which is designed to educate and build consensus is a positive step and should provide substantial value to the FCC in its pending 706 proceeding.
C. Most importantly, there has been no showing that the management of rights of way and the compensation for use of the right of way are in fact barriers to entry into the market. Where Courts have looked at the specific facts in each case, no such sweeping conclusion emerges.

IV CONCLUSION

In a recent speech before the Telecommunications Committee of the National Association of Regulatory Utility Commissioners here in DC this past winter, Assistant Secretary of Commerce Nancy Victory made an apt analogy. She likened keeping up with developments in the wake of the Telecommunications Act of 1996 to training for and running a sled in the Luge competition at the winter Olympics. As she said, "even the slightest muscle movement in the wrong direction will cause an imbalance that can send the sledder careening off track and into the icy wall."[9] We risk that crash if we act too quickly to change our course here. Instead, Ms. Victory's call for effective federal, state and local cooperation and coordination, coupled with maintaining a workable and flexible policy here at the FCC, is the solution that will win the competition.

It is tempting in an era of apparent financial crisis in the telecommunications industry to point fingers and attempt to lay blame. As Chairman Powell himself said, those who blame the regulators for the current debacle are mistaken. The Chairman points out that the regulators bent over backwards for six years to give the industry a chance to respond to the opportunities created by the Telecommunications Act."[10]

Make no mistake, the Commission and its Chairman do recognize the importance of access to the rights of way – but a federal solution is not mandated by the current financial crisis in the industry.

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[9] **Remarks of Nancy J. Victory, NARUC Committee on Telecommunications,** 2/12/02.

[10] **Remarks of Chairman Michael Powell, as reported by Nicholas Lemann,** The **New Yorker, October 7, 2002.**

APPENDIX

TEXT OF SECTION 253 OF THE TELECOMMUNICATIONS ACT OF 1996

SECTION 253 OF THE TELECOMMUNICATIONS ACT OF 1996 STATES:

(A) *IN GENERAL*

NO STATE OR LOCAL STATUTE OR REGULATION OR OTHER STATE OR LOCAL LEGAL REQUIREMENT, MAY PROHIBIT OR HAVE THE EFFECT OF PROHIBITING THE ABILITY OF ANY ENTITY TO PROVIDE ANY INTERSTATE OR INTRASTATE TELECOMMUNICATION SERVICE.

(B) *STATE REGULATORY AUTHORITY*

NOTHING IN THIS SECTION SHALL AFFECT THE ABILITY OF A STATE TO IMPOSE, ON A COMPETITIVELY NEUTRAL BASIS AND CONSISTENT WITH SECTION 254 OF THIS SECTION, REQUIREMENTS NECESSARY TO PRESERVE AND ADVANCE UNIVERSAL SERVICE, PROTECT THE PUBLIC SAFETY AND WELFARE, ENSURE THE CONTINUED QUALITY OF TELECOMMUNICATION SERVICES, AND SAFEGUARD THE RIGHTS OF CONSUMERS.

(C) *STATE AND LOCAL GOVERNMENT AUTHORITY*

NOTHING IN THIS SECTION AFFECTS THE AUTHORITY OF STATE OR LOCAL GOVERNMENT TO MANAGE THE PUBLIC RIGHTS OF WAY OR TO REQUIRE FAIR AND REASONABLE COMPENSATION FROM TELECOMMUNICATION PROVIDERS, ON A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY BASIS, FOR USE OF PUBLIC RIGHTS OF WAY, IF THE REQUIRED COMPENSATION IS DISCLOSED BY SUCH GOVERNMENTS.

47 USC § 253.

CONGRESS REFUSED TO PREEMPT LOCAL GOVERNMENT AUTHORITY: A NARRATED WALK THROUGH THE LEGISLATIVE HISTORY OF SECTION 253

Introduction

Section 253(c) protects local governments' authority to manage their public rights-of-way and to receive fair and reasonable compensation from all telecommunications occupants of those rights-of-way. This paper seeks to walk the reader through the debate surrounding adoption of Section 253 by following the development of the provisions through the Senate passage of S. 652, the Telecommunications Competition and Deregulation Act of 1995, and the House's substitution of House Bill 1555, the Communications Act of 1995, and finally culminating in adoption by both houses of final language in the conference agreement on the bills.

I. The Senate Bill

A. Introduction and Hearings

A draft of S. 652, the Telecommunications Competition and Deregulation Act of 1995, was circulated by Senator Larry Pressler (R-SD) on January 31, 1995. A draft Democratic alternative, the Universal Service Telecommunications Act of 1995, was circulated by Senator Hollings (D-SC) on February 14, 1995. Hearings were held on January 9, March 2, and March 21, 1995. No local government representatives were invited to testify.

At the hearings, Senator Kay Bailey Hutchison (R-TX) raised the concern of local governments to preserve their right to manage and receive compensation for use of public rights-of-way by telecommunications providers.[1] The Commerce Committee marked up S. 652 on March 23, 1995. The bill as reported included an amendment by Senator Hutchison to new section 254 (which ultimately became section 253) as follows:

> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

S. 652 as reported by the Commerce, Science, and Transportation Committee also contained an amendment in subsection (d) that was not sought by Senator Hutchison, and for which no Senator or committee staff member has publicly claimed responsibility, which gave the FCC the authority to preempt local government exercise of its authority under subsection (c) as well as to preempt state regulatory under subsection (b) and state and local authority under subsection (a). It read:

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[1] 141 CONG. REC. S8431 (1995).

(d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The language of Senator Hutchison's amendment is virtually identical to that finally enacted in 1996. But the language of the stealth amendment in subsection (d) in 1995 differs significantly from the language finally enacted in 1996. The Committee Report **(S.** Rpt. 104-23) explained the 1995 language by merely repeating it? The report language is ambiguous and could be read to imply that the focus of FCC preemption is to be barriers to entry.

Local governments were pleased with the affirmation of their authority over rights-of-way reflected in the Hutchison amendment that became subsection (c). They were very concerned, however, that the broad provision for FCC preemption under subsection (d) could act to wipe out that authority. The provision for FCC preemption of local right-of-way management and compensation authority in subsection (d) became the focus of local government concerns about **S.** 652 as it moved to the Senate floor in 1995.

The National League of Cities, the United States Conference of Mayors, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors mounted a major campaign to forestall FCC preemption of local right-of-way management and compensation authority. They were supported by the National Governors Association and the National Conference of State Legislatures, and by numerous individual cities and counties.

B. The **Floor of** the Senate: Kempthorne, Feinsten & Gorton

The Senate debated **S.** 652 on June 7, 8, 9, 12, 13, 14, and 15, 1995. Senators Dirk Kempthome (R-ID) and Diane Feinstein (D-CA) offered a floor amendment to strike subsection (d) entirely. This amendment would have entirely eliminated FCC jurisdiction over barriers to entry and disputes under subsections (a), (b), and (c), leaving those disputes to the courts. The Feinstein-Kempthome amendment failed on a narrow vote of 44-56 on June 14. The Senate then adopted, by voice vote, a substitute amendment supported by Senators Feinstein and Kempthome

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[2] "Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of local governments to manage the public right.-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation required is publicly disclosed. New section 254(d) requires the FCC, after notice and an opportunity for public comment, to preempt enforcement of any state or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsection (a) or other provisions **of** section 254." S.R. Rep. No. 104-23, at 35 (1995).

and offered by Senator Slade Gorton (R-WA). The substitute was developed after negotiations between the committee members and Senators Feinstein and Kempthome. The Gorton amendment as adopted read as follows:

> (d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The purpose of the Gorton amendment was to preclude FCC jurisdiction over disputes involving local government authority over rights-of-way management and compensation, while preserving FCC jurisdiction over telecommunications business regulation by state or local regulators. Thus, the structure of Section **253** itself reflects the distinction between business regulation and local governments' more property-related rights regarding compensation and management of the rights-of-way.

The floor debate over the Kempthome-Feinstein amendment, together with the debate over the subsequently adopted substitute Gorton amendment, makes clear that the Senate's intent in adopting the Gorton amendment was to completely remove FCC jurisdiction over subsection (c) disputes about whether local govemment management of compensation requirements for rights-of-way are competitively neutral or nondiscriminatory. For example, in explaining the Feinstein-Kempthome amendment, Senator Feinstein stated that

> the FCC lacks the expertise to address the cities' concerns. **As** I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.[3]

Senator Kempthome also gave an example:

> When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out **3** feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.[4]

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[3] **141** CONG. REC. S8,171 **(1995).**

[4] **141 CONG. REC. S8,173 (1995).**

Senator Feinstein also raised some theoretical questions about what the effect of subsection (d) would be if it were not so limited:

> [I]s a city insurance or bonding requirement a barrier to entry? **Is** a city requirement that a company pay fees prior to installing any facilities to cover the cost of reviewing plans and inspecting excavation work a barrier to entry? **Is** the city requirement that a company use a particular type of excavation equipment or **a** different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? **Is** a city requirement that a cable operator move a trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?'

In explaining his amendment, which was ultimately adopted, Senator Gorton made clear that the amendment was intended to remove from FCC jurisdiction the very kinds of management and compensation requirements that Senators Feinstein and Kempthome had referred to. He stated:

> [T]he Feinstein amendment... does have a legitimate scope. **I** join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. ... **I** am convinced that Senators Feinstein and Kempthorne are right in the examples that they give... [a]nd the amendment that **I** propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the jurisdictions which are affected.[6]

He added:

> [O]nce again, the alternative proposal [the Gorton amendment]... retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.[7]

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[5] 141 CONG. REC. S8,305 (1995)

[6] 141 CONG. REC. S8,306 (1995)

[7] 141 CONG. REC. S8,308 (1995). This distinction as to venue parallels the distinction between Section 402(a) appeals, which may be taken to courts where the party appealing resides, and Section 402(b) appeals concerning federally issued radio licenses and the like, that have been taken **to** the court of appeals in the District of Columbia since 1927.

Senator Gorton also made clear that the kinds of actions that would remain subject to FCC preemption authority under subsections (a) and (b) were very different: Grants of monopoly or exclusive rights in violation of subsection (a) ("This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction or one cable television provider");' or anticompetitive actions under subsection **(b)** "when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers."[9] Senator Gorton summarized: "So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights-of-way, there will not be jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances.""

C. Looking Ahead Just a Bit

It is imperative that any reader or interpreter of Section 253 (c) understand the dynamics of the Senate debate, as it is the Senate's language that is finally adopted in conference, but we are getting ahead of ourselves in the story.

II. The House Bill

A. Introduction and Hearing

House Bill 1555, The Communications Act of 1995, was introduced on May 3, 1995. Section 101 contained the following language on rights-of-way management and compensation similar to language in a predecessor, House Bill 4103, which had been passed by the House in the 103rd Congress:

> ***Section 243. Preemption***
>
> (a) REMOVAL **OF** BARRIERS TO ENTRY.- Except as provided in subsection (b) of this section, no State or local statute, regulation, or other legal requirement shall-- (1) effectively prohibit any carrier or other person from entering the business of providing interstate or intrastate telecommunications services or information service; or ***(2)*** effectively prohibit any carrier or other person providing interstate or intrastate telecommunications services or information services from exercising the access and interconnection rights provided under this part.

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[8] 141 CONG. REC. S8,306 (1995).

[9] 141 CONG. REC. S8,306 (1995).

[10] 141 CONG. REC. S8,306 (1995)(emphasis added).

(b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of State or local officials to impose, on a nondiscriminatory basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, ensure that a providers's business practices are consistent with consumer protection laws and regulations, and ensure just and reasonable rates, provided that such requirements do not effectively prohibit any carrier or person from providing interstate or intrastate telecommunications services or information services.

(c) CONSTRUCTION PERMITS.- Subsection (a) shall not be construed to prohibit a local government from requiring a person or carrier to obtain ordinary and usual construction or similar permits for its operations if-- (1) such permit is required without regard to the nature of the business; and (2) requiring such permit does not effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service.

(d) EXCEPTION.- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

(e) PARITY OF FRANCHISE AND OTHER CHARGES.- Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.

The chief proponent of subsections (c) and (e) of section 243 was Congressman Dan Schaefer (R-CO). The language in subsections (c) and (e) was generally referred to as the "MFS amendment," because that company had successfully sought inclusion of similar language in House Bill 4103 in the 103rd Congress.

Hearings were held on House Bill 1555 on May 10, 11, and 12, 1995. Local government representatives testified on May 11 and strongly opposed the language in new section 243 – particularly that in the MFS amendment.

The Telecommunications and Finance Subcommittee marked up House Bill 1555 on May 17, 1995. No amendments were made to section 243 at the markup and the Subcommittee reported the bill with the same language in section 243 as introduced.

The full Commerce Committee marked up House Bill 1555 on May **24** and **25,** 1995. At the full Commerce Committee mark on May **25,** Congressman Bart Stupak (D-MI) raised the concern of local governments about the language in section **243.** Congressman Stupak offered and then withdrew an amendment to section **243** that was similar to the language adopted by the Senate Committee, but without the pre-Gorton amendment provision for FCC preemption of local government right-of-way management and compensation authority. The language of the proposed Stupak amendment was as follows:

> STRIKE NEW SECTION 243 (a), (b), (c), and (e) beginning on Page **12,** Lme ***6*** , AND INSERT THE FOLLOWING NEW SECTION:
>
> REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.
>
> (b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

B. The Manager's Mark **for** the Floor

Congressman Stupak withdrew his amendment amid assurances by the committee leadership that efforts would be made before the bill was reported to the floor to work out language that would respond to the concerns of local governments over the limiting effect of subsections (c) and (e) concerning construction permits and parity language. Congressman Joe Barton (R-TX) took the lead on the majority side on behalf of local govemments in this effort. Efforts were made to reach agreement in talks and negotiations with the chief proponent of the section **243** language, Congressman Schaefer. The alternatives that were considered included a proposal to explicitly invalidate existing below-market telephone franchises that hindered the application of reasonable right-of-way compensation fees, and another proposal to specifically authorize fees at a level not to exceed eight percent. All versions offered by Congressman Schaefer, however, continued to include the objectionable parity language of paragraph (e) and

were rejected by Congressmen Stupak and Barton, who determined to take the matter to the full House.

The Committee Report on House Bill 1555, filed July 24, 1995, describes the relevant portions of section 243 as follows:

> Section 243(c) makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way. This provision clarifies that local control over construction on public rights-of-way is not disturbed. . . . Section 243(e) prohibits a local government from imposing a franchise fee or its equivalent for access to public rights-of-way in any manner that discriminates among providers of telecommunications services (including the LEC). The purpose of this provision is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity. It is not the intent of the Committee to deny local governments their authority to impose franchise fees, but rather simply to require such fees he imposed in a non-discriminatory manner. This paragraph is not intended to affect local governments' franchise powers under Title VI of the Communications Act. Local governments can remedy any situation in which a fee structure violates this section by expanding the application of their fees to all providers of telecommunications services, including the LECs. Moreover, this section does not invalidate any general imposition that does not distinguish between or among providers of telecommunications services, nor does it apply to any lawfully imposed tax."

C. The Floor Debate: Barton, Stupak and Schaefer

The House debated House Bill 1555 on August 3 and 4, 1995. The manager's amendment, adopted by the House, included a revision to section 243 in an attempt to head off adoption of a Barton-Stupak amendment. The manager's amendment revised subsection (b) by striking the words "or local", and it inserted a new subsection (c)(2) as follows:

> MANAGEMENT OF RIGHTS OF WAY.- Nothing in subsection (a) shall affect the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

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[11] H.R. REP. NO. 104-204, at 75-76 (1995).

This language was the same as part of the Hutchison amendment adopted by the Senate Committee. The manager's amendment left in place, however, what to local government was the objectionable parity language of the Schaefer-MFS provision in subsection (e).

The Barton-Stupak amendment was one of very few amendments permitted by the House Rules Committee under the rule governing debate on House Bill 1555. The Barton-Stupak amendment proposed to strike ***all*** of section **243** as reported by the House Committee and to substitute new language. The new language was essentially the same as that of the Senate Committee, with three qualifications: (1) it would extend the safe harbor of subsection (b) to local as well as State governments; **(2)** it would apply the safe harbor in subsection (c) to the entire Act, not just that section; and (3) it would eliminate any reference to FCC preemption jurisdiction over State or local actions.

The Barton-Stupak amendment read as follows:

Section 243. REMOVAL **OF** BARRIERS TO ENTRY

(a) IN GENERAL.- No State or local statute, regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services,

(b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of State or local officials to impose, on a competitively neutral basis and consistent with section **247** (relating to universal service), requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) EXCEPTION.- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

In his remarks on the House floor during the debate on House Bill **1555,** Congressman Stupak particularly stressed that the Barton-Stupak amendment would delete the requirement for parity between the LEC and other providers, and instead could allow different compensation from different providers for use of the rights-of-way. He stated:

> Local governments must be able to distinguish between different telecommunications providers... The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip **up** our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize telecommunications companies . . . .[12]

Congressman Barton stated a similar intent:

> [The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right-of-way.... The Chairman's [Manager's] amendment has tried to address this problem. It goes part *of* the way, but not the entire way. The Federal Government has no business telling State and local governments how to price access to their local right-of-way.[13]

Over the vigorous opposition of Rep. Schaefer, the proponent of the "MFS amendment," the House debated and adopted the Barton-Stupak amendment by an overwhelming vote of 338-86. In arguing vigorously (and unsuccessfully) against the Barton-Stupak amendment, Congressman Schaefer and others made many of the same arguments that the telecommunications industry later made in petitions to the FCC. **For** example, Congressman Schaefer claimed that acceptance of the Barton-Stupak amendment "is going to allow the local governments to slow down and even derail the movement to real competition."[14] Congressman Fields claimed that cities are allowed to charge incumbent telephone company little or nothing because of "a century-old charter .. which may even predate the incorporation of the city itself. ... [T]hey threaten to Balkanize the development of our national telecommunications infrastructure...." "When a percentage of revenue fee is imposed by a city on a telecommunications provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anti-competitive...." "[W]hat does control of rights-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.""

After hearing Congressman Schaefer's arguments, the House rejected them and adopted the Barton-Stupak amendment by **a** vote of 338-86. By adopting Barton-Stupak, the House

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[12] **141** CONG. REC. H8,460 **(1995).**

[13] **141** CONG. REC. S8,460 **(1995).**

[14] **141** CONG. REC. S8,460 **(1995).**

[15] **141** CONG. REC. S8,461 **(1995)**

strongly rejected the Schaefer-Fields arguments for the MFS parity language. By adopting Barton-Stupak, which was the same as the Senate language with respect to fair and reasonable compensation for right-of-way use, the House overwhelmingly endorsed the proposition that differential compensation based on market valuation is not discriminatory and that local governments are the appropriate body to make compensation decisions.

III. The Conference Agreement

Despite the overwhelming House vote for the Barton-Stupak amendment, the close vote on Feinstein-Kempthorne, and the unanimous adoption of the Gorton amendment in the Senate, the debate over rights-of-way management and compensation language continued into the conference process. Speculation was that certain House Committee staff, who apparently did not accept, or were instructed not to accept, the clear will and intent of the two houses of Congress fueled the debate. The final conference agreement on Senate Bill 652/House Bill 1555 as adopted by both houses, however, adopts the Senate language of section 253. The final law thus preserves the safe harbor protecting the authority of local governments over rights-of-way management and compensation and preserves the clear intent of Congress that the FCC is to have no jurisdiction over subsection (c) disputes, leaving them to the courts. It also preserves the recognition that "fair and reasonable" does not require that compensation be identical for differently situated users of the public rights-of-way.